

**EMPLOYER STATUS DETERMINATION
GWI SWITCHING, L.P.**

This is the determination of the Railroad Retirement Board concerning the status of GWI Switching, L.P. (GWI), as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

GWI is a switching railway that provides services to only one customer, CMC Railroad I Ltd. Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any express company, sleeping-car company, and carrier by railroad, subject to [the Interstate Commerce Act];

(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad * * *.

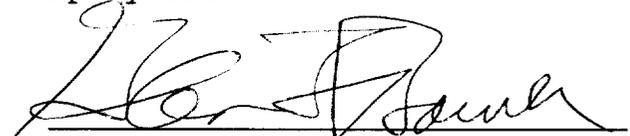
Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

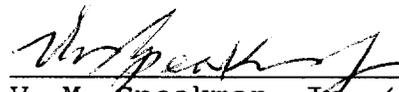
The Interstate Commerce Commission has jurisdiction over common carriers engaged in the interstate transportation of passengers or property by railroad pursuant to section 10501 of title 49 of the United States Code. A common carrier may be defined in general as one which holds itself out to the public as engaging in the business of transporting people or property from place to place for compensation. It is the right of the public to demand service that is the real criterion determinative of an entity's character as a common carrier. In contrast, a private carrier is one which, without making it a vocation or holding itself out to the public as ready to act for all who desire the service, undertakes by special agreement in a particular instance only, to transport property or persons from place to place. Private carriers thus undertake not to carry for all persons indiscriminately, but rather transport only for those with whom they see fit to contract individually. The RRB has followed the distinction made by the Interstate Commerce Commission, which is judicially supported in The Tap Line Cases, 234 U.S. 1 (1913); also International Detective Service, Inc. v. Interstate Commerce Commission, 595 F.2d 862, 865 (D.C. Cir. 1979).

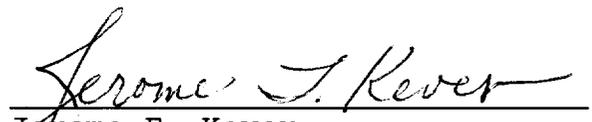
GWI SWITCHING, L.P.

In this case, GWI does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather, it performs switching services over that line only for the one company with which it has contracted. Accordingly, the Board determines that GWI is not a carrier under the Acts.

GWI is controlled by Genesee and Wyoming Industries, Inc., which controls a number of rail carriers. GWI is therefore under common control with employers under the Acts. However, GWI, which is a limited partnership that operates a rail storage yard, does not provide any services for its affiliates. It operates the yard for CMC Railroad I Ltd, an unaffiliated company. Accordingly, in the opinion of a majority of the Board, GWI is not providing service in connection with rail transportation; since it is also not a carrier, as defined in paragraph (i) of section 1(a)(1) of the Railroad Retirement Act, it is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.


Glen L. Bower


V. M. Speakman, Jr. (Dissenting
Opinion Attached)

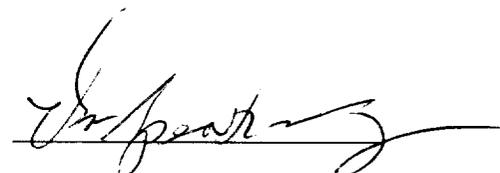

Jerome F. Kever

Attachment

DISSENT OF V. M. SPEAKMAN, JR.
ON THE EMPLOYER STATUS DETERMINATION
GWI SWITCHING, L.P.

I agree that GWI Switching, L.P. (GWI) is under common control with a number of employers under the Acts. In addition, this company may be performing railroad related services in that it furnishes switching services for CMC Railroad I LTD, (CMC). The fact that GWI is not providing railroad services for its affiliate should be irrelevant in a coverage determination case. If CMC is, in fact, a covered employer, then GWI should, in turn, be covered.

I must dissent from the majority opinion in this case and feel that absent a coverage determination on CMC, a valid decision in the current case cannot be made.



V. M. Speakman, Jr.

12/6/84

Date

EMPLOYER STATUS DETERMINATION

GWI Switching Services, L.P.

Decision on Reconsideration

This is the determination on reconsideration of the Railroad Retirement Board concerning the status of GWI Switching Services, L.P. (GWI) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

By letter dated December 28, 1994, GWI was notified of B.C.D. 94-113, wherein a majority of the Board, Mr. Speakman dissenting, found that GWI was not an employer under the RRA and the RUIA. By letter dated December 22, 1995, GWI requested reconsideration of the Board's decision and stated that page 2 of the Board's decision contained a factual error in the following statement:

In this case, GWI does not hold itself out to the public as engaging in the business of transportation of persons or property over the line in question. Rather, it performs switching services over that line only for the one company with which it has contracted.

GWI stated that it has held itself, and continues to hold itself, out as a common carrier of rail services to all parties. GWI explained that although it presently serves one customer, its intent and strategy is to broaden its activities to include additional customers. GWI stated that in order to achieve that goal, it reserved for itself in its operating agreements the right to serve additional customers. GWI pointed out that its Southern Pacific Trackage Rights Agreement does not restrict GWI's operations to Southern Pacific's plastic pellet railcars. That same Agreement allows GWI to operate over approximately 5.2 miles of the Southern Pacific Baytown Branch and Southern Pacific Lafayette Main Line. GWI stated that it believes that the introduction of Burlington Northern into the territory, by means of trackage rights over the Southern Pacific Lafayette Main Line, in connection with pending merger transactions, will offer significant opportunities for expanded service by GWI to a variety of customers in the area.

The basis for the Board's decision in B.C.D. 94-113 was the statement cited by GWI in its request for reconsideration. The additional information provided by GWI indicates that GWI does, in fact, meet the criteria for being a common carrier discussed in B.C.D. 94-113. Since GWI does hold itself out as a common carrier to provide rail services, the Board finds that it does fall within the definition of a carrier employer set out in

section 1(a)(1)(i) of the RRA and sections 1(a) and (b) of the RUIA.

The decision in B.C.D. 94-113 is reversed. The Board finds that GWI became a carrier employer under the RRA and the RUIA effective April 6, 1994, the date on which it began operations.

Glen L. Bower

V. M. Speakman, Jr.

Jerome F. Kever

CCCook:SABartholow:MPDadabo:mpd:ik
GWIS3111.cov
C. 3111-95

TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination -- Decision on Reconsideration
GWI Switching Services, L.P.

Attached is a proposed coverage decision on reconsideration which reverses B.C.D. 94-113 and holds that GWI Switching Services, Inc. ("GWI") became a carrier employer effective April 6, 1994, the date on which it began operations. I am also attaching copies of B.C.D. 94-113 and GWI's request for reconsideration.

Attachments